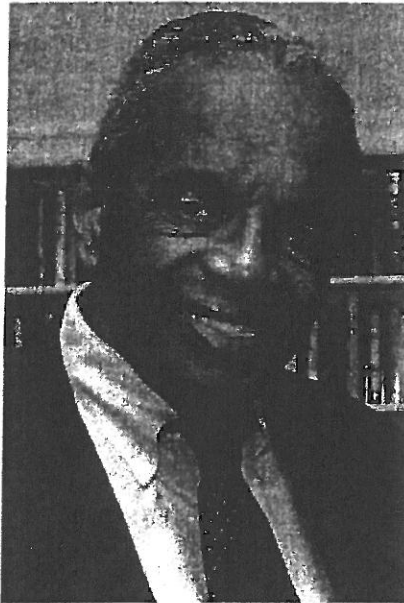


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Derrick Bell: the Scholar Remembered



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Derrick Bell is remembered for changing the landscape of legal scholarship.

By Lani Guinier and Gerald Torres

The legal academy lost an intellectual force of nature with the passing of Derrick Bell on October 5. Bell's pursuit of racial and social justice and his dogged critique of liberal incrementalism in universities and elsewhere was like a persistent wind that changed the landscape of law schools and influenced the larger academic world as well. He worked in so many ways: a mentor to many of today's leading academics, a master teacher whose commitment to his law students was unquestioned and unmatched, and a provocative scholar and critic. He was a celebrated maverick before that word lost its luster.

Bell pioneered a style of scholarship that made narrative and storytelling important components of legal inquiry and justification. Through that method, he was able to reach broad audiences as well as to probe knotty and complex issues in law and social policy. To bring the Socratic method to life, he created a learned time-traveling interlocutor, Geneva Crenshaw. Crenshaw was trained in law, but she also had magical qualities that allowed closed questions to be reopened and counterfactual histories to be probed. In "The Chronicle of the Constitutional Contradiction," for example, Crenshaw questioned framers of the Constitution and the compromises they made for slavery, in particular the counting of three-fifths of the enumerated population of slaves to enhance the white Southern representation in Congress. By highlighting that moral compromise, Crenshaw correctly identified the constitutional snake in the

garden of "originalism" (the commitment among conservative judges to interpreting the modern Constitution based exclusively on what the founders thought).

Moreover, as one of us has previously written, courts record "a culture's practices of telling and listening to its stories"; the stories that are allowed to be told are an expression of power. Because Bell was writing from an elite perch (he was the first tenured black professor at Harvard Law School) and was being published in elite venues, he was able to move our culture's narrative construals of reality out of the background. His work on stories, for example, has been used by philosophers, anthropologists, and sociologists as well as legal scholars. His trailblazing opened the path for a new kind of cross-disciplinary approach to the law.

Bell's narrative innovations were not without criticism. Jurists like Judge Alex Kozinski, chief judge of the U.S. Court of Appeals for the Ninth Circuit, and Judge Richard A. Posner, a judge on the U.S. Court of Appeals for the Seventh Circuit and a professor at the University of Chicago Law School, for example, dismissed them as untestable or not based on rational argument. Such objections not only missed Bell's educational and narrative strategy; they also ignored the fact that much of his work was brilliantly argued in the conventional style of legal reasoning.

That was especially true of Bell's canonical essay, "Serving Two Masters," first published in 1976. In it, he boldly suggested that the interests of civil-rights lawyers and their clients are often in conflict, especially when the lawyers are beholden to those financing the organization for which they work.

Indeed, Bell was one of the pioneers of critical race theory, which challenged liberalism for failing to go far enough in opposing the entrenched interests that historically benefited from the racial caste system that was being dismantled. According to critical race theory, the defining elements of postwar racial liberalism were its pragmatic devotion to a single strategy of litigation, its static view of American racism, and its focus on top-down social reform, which emphasized the corrosive effect of individual prejudice and the importance of interracial contact in promoting tolerance. As Bell recognized, that strategy left poor whites haunted by the sense that they had been betrayed by the elites; at the same time, it enabled them to blame blacks as the beneficiaries of that betrayal.

As an early proponent of the theory, Bell freed scholars from an old-fashioned reliance on fixed racial categories and introduced the idea that "race" was a verb, not just a noun. Thus, people are "raced" by the larger society rather than simply by their genetic makeup. Bell led scholars in many disciplines to see how the interests of middle- and upper-class whites drove social change. Thus litigation alone would not produce significantly new and inventive policy solutions.

Judicial decisions by themselves, in Bell's view, were never enough to produce durable social change. Even the iconic desegregation decision of the U.S. Supreme Court in *Brown v. Board of Education* did not escape his critique of the limits of law. The strategy of the attorneys in *Brown*, and their liberal allies, enabled the justices to consider the

effects of racial discrimination without fundamentally disrupting the privileges enjoyed by upper- and middle-class whites, he believed. So he penned a hypothetical dissent that illustrated that the court, in *Brown*, failed to confront the true meaning of separate but equal. Thus Bell's hypothetical dissent (in a collection edited by the Yale University legal scholar Jack M. Balkin) argued that the court decision was no match for the systemwide damage wrought by the legacy of slavery and Jim Crow.

The Derrick Bell Reader (New York University Press, 2005) maps the capacious universe of Bell's work. It includes his groundbreaking analysis of the "interest convergence" dilemma. (On the one hand, "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites," he wrote. On the other hand, the Constitution "will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- or upper-class whites.")

There he showcased his innovative use of storytelling to chronicle challenges involving race, class, and gender; his provocative focus on the ethical tension faced by cause lawyers whose commitment to their ideals interferes with their service to their clients; his pioneering discussion of popular democracy (criticizing the use of referenda where the interests of blacks and other marginalized groups are at stake).

The ideas that energized Bell's scholarly work could never be separated from his life. "I learned this hard lesson as a civil-rights lawyer when during the 60s I would fly into town and meet with several groups, and take down all the information about their problems and the discrimination and the schools and the public accommodations, and fly back to New York and prepare the complaints and get them filed and handle the cases," he once told NPR. "And I thought that my place in heaven was assured." But looking back, he realized that if local people didn't organize, nothing would change.

"I am much more humble with regard to my role today than I was as a young civil-rights lawyer."

Similarly, Bell was at the forefront of a protest against Harvard Law School's failure to appoint a more gender-diverse faculty. Disappointed with his academic colleagues, he left his position as the first black tenured professor in the school in part because he felt that his departure would create a vacuum that the students and the younger faculty would fill. "My presence tended to perhaps stifle some of their development as leaders," he said.

Not surprisingly, Bell's work inspired each of us to speak to a larger, more interdisciplinary audience outside of the confines of the legal academy. One of us has engaged Bell's ideas in *The Journal of American History*, for example. The other has presented his work on the law and stories to gatherings of philosophers. Many others could make similar remarks.

Derrick Bell's legacy was not limited to what he wrote in law-review articles. He spoke to a wide audience that included people who were once his clients at the NAACP Legal Defense Fund, as well as to intellectuals from a variety of disciplines. Whether he was writing for truck drivers or scholars, his work is among the most frequently cited both inside and outside the legal academy, a significant accomplishment given the iconoclastic positions he often embraced.

Derrick Bell traversed the world of ideas with a practitioner's know-how, a lawyer's aptitude for controversy, a professor's appreciation of rigor, a rock-solid integrity, and an abiding passion for justice. In verse, legend, or footnote-studded prose, he wrote from the head and from the heart. He will be missed.

Lani Guinier is a professor of law at Harvard Law School and Gerald Torres is a professor of law at the University of Texas School of Law.